SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

02/08/2002 CLERK OF THE COURT
FORM L000

HONORABLE MICHAEL D. JONES M. Cearfoss
Deputy

LC 2001-000111

FILED: _____

STATE OF ARIZONA GARY L SHUPE

v.

RICHARD TERREL SULLIVAN CHRISTOPHER G MCBRIDE

PHX MUNICIPAL CT
REMAND DESK CR-CCC

RULING
AFFIRMING/REMAND

PHOENIX MUNICIPAL COURT

CIT. NO. 5832461-1C, 2C, 3V, 4V

CHARGE:
1. DUI/ALCOHOL
2. DUI WITH BAC OF .10% OR MORE
3. IMPROPER LEFT TURN AT INTERSECTION
4. FAILURE TO DRIVE ON RT SIDE OF RAODWAY

DOB: 01-07-1971

DOC: 02-27-1999

02/08/2002 CLERK OF THE COURT
FORM L000

HONORABLE MICHAEL D. JONES M. Cearfoss
Deputy

LC 2001-000111

This Court has jurisdiction of this appeal pursuant to the Arizona Constitution, Article VI, Section 16, and A.R.S. Section 12-124(A).

This matter has been under advisement since January 9, 2002, at which time, at the request of the parties, the oral argument set for that date was vacated. This Court has considered the record of the proceedings from the Phoenix Municipal Court, the exhibits made of record, and the memoranda of counsel. This decision is made within 30 days as required by Rule 9.8, Maricopa County Superior Court Local Rules of Practice.

Appellant, Richard Terrell Sullivan, was charged with Driving While Under the Influence of Intoxicating Liquor, a class 1 misdemeanor, in violation of A.R.S. Section 28-1381(A)(1); Driving With a Blood Alcohol Level Greater Than .10, a class 1 misdemeanor, in violation of A.R.S. Section 28-1381(A)(2); Making an Improper Left Turn at an Intersection, a civil traffic violation, in violation of A.R.S. Section 28-751.2; and Failure to Drive on the Right Side of the Roadway, a civil traffic violation, in violation of A.R.S. Section 28-721(A). Appellant filed a Motion to Suppress/Dismiss the results of an Intoxilyzer. After hearing from both parties, the trial judge denied Appellant’s Motion to Suppress/Dismiss. Thereupon, both parties waived their rights to a jury trial and submitted the case to the judge on the basis of departmental reports and other exhibits. Appellant was found guilty or responsible on all charges except the Making an Improper Left Turn at an Intersection charge. Appellant was ordered to serve 10 days in jail, nine days were to be suspended pending successful completion by Appellant of substance abuse screening and treatment. Appellant was fined $443.00 and filed a timely Notice of Appeal in this case.

The issues presented on appeal concern the trial judge’s denial of Appellant’s Motion to Suppress/Dismiss the results of

the breath-alcohol test. This Court's inquiry is fourfold and will be addressed *in seriatim*:

(1) Did the State meet the foundational requirements of A.R.S. Section 28-1323(A)(5) so as to render the breath-alcohol test statutorily admissible pursuant to A.R.S. Section 28-1323(B);
(2) Does the State's failure to provide a Baca[1] sample render the breath-alcohol test inadmissible;
(3) Are A.R.S. Sections 28-1323(A) and (B) unconstitutional; and
(4) Were Appellant's due process rights violated by the State's failure to provide adequate records under the Adams or the Cobra data base systems, or to have hard copy records.

First, Appellant argues that the foundational requirements of A.R.S. Section 28-1323(A)(5) were not met. Appellant's expert witness, Chester Flaxmayer, initially opined that in his opinion the breath-alcohol test given to Appellant on December 15, 1999, was not an accurate test.[2] Upon cross-examination, however, Mr. Flaxmayer clarified his opinion:

> Q:(by Mr. Rich)...You testified on direct examination that based upon certain information that was reflected to you in the printout, you were of the opinion that the machine was not operating accurately and properly on the date in question, is that correct?
>
> A:(by Mr. Flaxmayer) Actually, I believe the question was from the other direction. The question was, could I say, based on the information in Cobra that it was operating properly and accurately. And I said no, I could not...based on the fact that there are gaps and there's unreported data...[3]

[1] *See* Baca v. Smith, 124 Ariz. 353, 604 P.2d 617 (1979).
[2] RT of February 14, 2001, at page 32, line 6.
[3] RT of February 14, 2001, at page 36, lines 11-23.

Appellant's assertion that "the uncontroverted testimony of the expert established that the device at issue was not working properly and accurately"[4] is erroneous.

Rather, substantial evidence supports the trial judge's finding that A.R.S. Section 28-1323(A)(5) was met. Mr. Flaxmayer, on cross-examination, acknowledged that Exhibit 8, the Exhibit PP dated 12/9/99 (pre-test), and Exhibit 10, the Exhibit PP dated December 28, 1999 (post-test), both reflect affirmative responses to the question, "Is instrument operating accurately?"[5] A.R.S. Section 28-1323(A)(5) requires that:

> (5) The device used to conduct the test was in proper operating condition. Records of periodic maintenance that show that the device was in proper operating condition at a time before and after the test are admissible in any proceeding as *prima facie* evidence that the device was in proper operating condition at the time of the test...

Appellant makes much of the following comment within the trial judge's ruling:

> 'Question: Has the State provided the necessary documents to admit the reading?' And my recollection is that [Mr. Flaxmeyer] said yes as to that.[6]

While Appellant is correct that this precise question and answer were not asked and answered,[7] Exhibit 8 and Exhibit 10, and Mr. Flaxmayer's testimony acknowledging the content of each,[8] support

[4] Appellee's [*sic* Appellant's] Memorandum at page 5, lines 11-12.
[5] RT of February 12, 2001, at page 36, line 5.
[6] RT of February 15, 2001, at page 49, lines 5-8.
[7] Appellee's [*sic* Appellant's] Memorandum at page 2, line 28.
[8] *See* fn. 4, *supra*.

the trial judge's characterization of the testimony contained in his notes.

Exhibit 8 and Exhibit 10 are monthly calibration checks. Monthly calibration checks, conducted pursuant to DHS regulation R9-14-404(A), are records of periodic maintenance within the meaning of A.R.S. Section 28-1323(A)(5).[9] Accordingly, the State met the foundational requirements of A.R.S. Section 28-1323(A)(5), so as to render Appellant's breath-alcohol test statutorily admissible pursuant to A.R.S. Section 28-1323(B).

Secondly, Appellant argues that the State's failure to provide a Baca[10] sample renders the breath-alcohol test inadmissible. Moss v. Superior Court[11] disposes of this argument:

> ...we hold that due process does not require the state to provide DUI defendants with a separate additional breath sample for independent testing when replicate tests on an Intoxilyzer 5000 are employed as prescribed by the DHS and DPS regulations.[12]

Here, Appellant was given replicate tests on an Intoxilyzer 5000 as prescribed by the DHS and DPS regulations at 1:23 a.m. (.112) and at 1:30 a.m. (.121) on December 15, 1999.[13] No Baca sample was required.

Third, Appellant argues that A.R.S. Sections 28-1323(A) and (B) are unconstitutional. However, the very case cited by Appellant in support of his separation of powers argument holds that the subject statute does not conflict with the rules of evidence nor does it threaten to engulf a general rule of

[9] State *ex rel* McDougall v. Superior Court, 181 Ariz. 202, 207, 888 P.2d 1389 (App. 1995); State v. Duber, 187 Ariz. 425, 428, 930 P.2d 502 (App. 1996).
[10] *Supra.*
[11] 175 Ariz. 348, 857 P.2d 400 (App. 1993).
[12] Id. At 353.
[13] Exhibit 1, Phoenix Police Department Alcohol Influence Report, at page 2.

admissibility, but rather is a workable, reasonable method provided as an alternative to the method of admission under the Rules of Evidence and is, thus, constitutional.[14]

Fourth, and lastly, Appellant argued to the trial judge "that the due process guarantees contemplated by Moss and Trumbetta [sic] have here been eviscerated by the State and I think the appropriate remedy is to dismiss."[14] The trial judge's denial of Appellant's Motion to Dismiss was not argued on Appeal. However, the denial of due process constitutes fundamental error.[15] Such error cannot be waived.[16] Appellant claimed that he was denied a meaningful opportunity to present a complete defense[17] by the failure of the State's computer system to maintain records (electronic data) on the Intoxilyzer 5000 used to test Appellant's breath for alcohol. Appellant points to the absence of any electronic or hard copy records for a repair allegedly made on or between October 26 and October 30, the absence of any electronic or hard copy records between the end of the Adams database on November 24, and the beginning of the Cobra database on December 9, and the absence of the corresponding electronic records for the January 5 PP and QQ which exist in hard copy.

As to the alleged repair made between October 26 and October 30, the State argues that no such repair was made. In this regard, Mr. Flaxmayer testified that "it looks like the DVM was actually adjusted"[18] that "[i]t appears to have occurred sometime between October 26 and October 30"[19] and that he "wouldn't expect [the DVM fluctuations which occurred on October 26 to happen without human intervention] on a properly

[14] State *ex rel* Collins v. Seidel, 142 Ariz. 587, 591, 691 p.2d 678 (1984). *See also* State v. Leonard, 151 Ariz. 1, 5, 725 P.2d 493 (App. 1986).
[14] RT of February 14, 2000, at page 46, lines 22-25.
[15] State v. Flowers, 159 Ariz. 469, 472, 768 P.2d 201 (App. 1989).
[16] Id.
[17] California v. Trombetta, 467 U.S. 479, 484, 104 S.Ct. 2528, 81 L.Ed.2d 413 (1984); Moss v. Superior Court, 175 Ariz. 348, 353, 857 P.2d 400 (App 1993).
[18] RT of February 14, 2001, at page 22, line 24.
[19] RT of February 14, 2001, at page 23, lines 5-6.

functioning Intoxilyzer..."[20] Thus Appellant, in the absence of repair records, could arguable posit either that the repair records are missing, or the machine was not properly functioning. There is nothing to suggest that a repair was, in fact, done other than Mr. Flaxmayer's opinion.

As to the "gap" between the Adams database ending on November 24, 1999, and the Cobra database beginning on December 9, 1999, there is nothing to suggest that records, in fact, existed. Adams was a non-Y2K compliant database. Cobra was a Y2K compliant database. The subject Intoxilyzer was calibrated on December 9, 1999, the first day of the Cobra database's implementation. Appellant is not able to show that any data which may have existed but was not stored had any evidentiary value whatsoever.

As to the absence of the corresponding electronic records for the January 5 PP[21] and January 5 QQ,[22] the fact remains that this data, in fact, exists in hard copy and was provided to Appellant. Appellant cites to no regulation that mandates the electronic storing of this data and Mr. Flaxmayer testified to none.

Appellant was free to argue these alleged record deficiencies, as well as the inferences therefrom (as well as the inferences from the allegedly high percentage of deficient samples from September 14, 1999, to April 23, 2000, on the subject machine prior to its major repair between June 15, 2000, and July 11, 2000) to the finder of fact. The trial judge so ruled:

> It's the Court's decision that the readings will be allowed in. The jury will be advised of the defense right to question the accuracy of the machine

[20] RT of February 14, 2001, at page 23, lines 18-19.
[21] Defendant's Trial Exhibit 11.
[22] Defendant's Trial Exhibit 12.

> and the defense will have an opportunity to present expert testimony as to how they were deprived of that opportunity, and the jury will then be instructed that if they find they were deprived, they should consider that as to what weight to give the evidence.[23]

Appellant was not denied "a meaningful opportunity to present a complete defense."[24] Accordingly, no due process violation occurred.

This Court must not reverse a trial judge's ruling in the absence of a record which demonstrates a clear abuse of the trial judge's discretion.[25] An appellate court must view the facts in a light which is most favorable to upholding a trial judge's ruling, resolving reasonable inferences against the Appellant.[26]

There is clearly substantial evidence in the record to support the trial judge's ruling denying Appellant's Motion to Suppress/Dismiss. Finding no other error, the trial judge's determination must be affirmed.

IT IS ORDERED affirming the trial judge's denial of Appellant's Motion to Suppress.

IT IS FURTHER ORDERED affirming the judgments of guilt and responsibility, and the sentences and sanctions imposed.

IT IS FURTHER ORDERED remanding this case back to the Phoenix Municipal Court for all future proceedings.

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[23] RT of February 15, 2001, at page 48, lines 15-21.
[24] *See* fn. 17, *supra*.
[25] State v. Morales, 170 Ariz. 360, 364, 824 P.2d 756 (App. 1991).
[26] State v. Guerra, 161 Ariz. 289, 293, 778 P.2d 1185 (1989).